

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: July 9, 1990

CASE NO. 87-JTP-27

IN THE MATTER OF

STATE OF NEW MEXICO,

COMPLAINANT,

v.

UNITED STATES DEPARTMENT OF
LABOR GRANT OFFICER,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

Before me for review is the Decision and Order (D. and O.) of Administrative Law Judge R.S. Heyer, issued on November 14, 1989, in this case which arises under the Job Training Partnership Act (JTPA), 29 U.S.C. §§ 1501-1781 (1982), and regulations promulgated thereunder. See 20 C.F.R. Parts 626-684 (1989).

After a de novo hearing, the ALJ concluded that Complainant (also referred to herein as the State), through a **subgrant** to the University of New Mexico (UNM), misspent \$600,000 of Title II-A JTPA funds, and that the entire expenditure must be disallowed. On review, the State urges remand of the case for an additional

hearing to permit an apportionment of the \$600,000 in issue. ^{1/} The State also contends that the **ALJ's** findings that expenditures were not properly allocated to training, and that the procurement of the computer systems in issue was improper, should be reversed. Upon thorough review of the record, I conclude that \$600,000 of Title II-A JTPA funds were misspent by the State and that the entire expenditure must be disallowed.

INTRODUCTION

The purpose of the Job Training Partnership Act is to establish programs to prepare youth and unskilled adults for entry into the labor force and to afford job training to economically disadvantaged individuals facing serious barriers to employment, who are in special need of such training to obtain productive employment. 29 **U.S.C. §** 1501. JTPA is funded by federal appropriations to the Department of Labor (DOL) which makes grants to the states which create and implement JTPA programs in conformity with applicable standards.

Title II of JTPA authorizes the expenditure of JTPA funds by the states for training services for **"economically** disadvantaged" individuals, and Title II-A specifically provides for the use of funds for training services for economically disadvantaged **"adults"** and **"youth."** The **subgrant** of funds from the State to

^{1/} The State's request for apportionment is argued for the first time on review before me. Below, the State contended that it and **UNM** had complied with applicable law and that all of the questioned costs should be allowed. Memorandum Brief of the State of New Mexico, filed September 15, 1989, at 19-20.

UNM in the present case used JTPA II-A funds; accordingly, the individuals required to be targeted and served under the **subgrant** are JTPA II-A eligible participants. The precise **"adults"** and **"youth"** who are JTPA II-A eligible individuals are defined by the eligibility criteria set out at 29 U.S.C. § 1603. JTPA regulations require the states to keep adequate records of each participant's enrollment in a JTPA program in order to demonstrate compliance with the relevant eligibility criteria. See 29 C.F.R. § 629.35(c).

Although it is the states which establish, implement and monitor their own JTPA programs free of direct federal control, JTPA nevertheless provides for accountability by the states to the federal government for the misexpenditure of JTPA funds. JTPA program costs **resulting from violations** of, or noncompliance with, federal, state or local laws are not allowable and constitute misexpended funds. See 20 C.F.R. § 629.37(c)(1). Thus, for example, the violation of JTPA regulations governing the expenditure of funds for training or for procurement would constitute a basis for disallowance of JTPA funds so expended.

FACTUAL BACKGROUND

1. The Degem Proposal

In the latter part of 1983, Degem Systems, Ltd. (Degem), an Israeli firm specializing in computer learning technology, contacted the Governor of New Mexico concerning a proposal by Degem to create a pilot demonstration project in the State. Grant Officer's Exhibits (G.O. Ex.), pp. 190-191. The initial

proposal (inter alia) contemplated a demonstration project involving computer-aided instruction for schools which would become a showcase for the development, manufacturing and promotion of new computer technologies for all of the United States. Id. Degem projected that up to 4,300 direct new jobs **would** be provided in the State as well as 6,800 additional indirect jobs with subcontractors. Id. As of the date of this contact with the Governor, individuals on the State's Private Industry Council (PIC) ^{2/} already had been approached and had purportedly expressed great interest in the project. Id. Degem accordingly stated its hope that **10-15%** of the State's total JTPA budget of \$12 million could be dedicated to the project. Id. In January 1984 state officials visited Degem in Israel and observed the computer-aided instruction systems in operation. See OIG Investigative Memorandum (OIG Memo), p. 2, G.O. Ex., pp. 90, 91.

Degem later contacted the Dean of the College of Education of the University of New Mexico to propose a cooperative venture between Degem and UNM, whereby UNM (inter alia) would evaluate and research the Computer-Aided Instruction (CAI) systems Degem

^{2/} The Private Industry Council is established for each state under Section 102 of JTPA, 29 U.S.C. § 1512. Its membership is composed of representatives from the private sector, who constitute a majority, as well as representatives from organized labor, educational agencies and public employment. The function of the PIC is to provide policy guidance and oversight with respect to job training plans, in partnership with government representatives. See 29 U.S.C. § 1513; see also 20 C.F.R. § 628.2. In particular, the PIC is authorized to select grant recipients and entities to administer a job training plan. 29 U.S.C. § 1513(b)(1)(B).

had developed, would develop new software and courseware for such systems, would train teachers on use of the systems and would provide other forms of promotion and support to make the New Mexican model a national showcase. G.O. Ex., pp. 193-195. **UNM** promptly replied that it was highly capable of being a productive partner with Degem and UNM made specific proposals for setting up a demonstration project. **G.O. Ex., pp. 197-202.**

Degem then confirmed with the Governor its proposal for a pilot demonstration project in cooperation with UNM, G.O. Ex., pp. 107-108, and repeated its firm intention to establish a manufacturing plant and a research and development facility in the state of New Mexico. **Id.** On June 24, 1984, the Governor visited Israel on a trade mission to see the Degem **CAI** system. OIG Memo, p. 2.

The precise manner in which JTPA Title II-A regular funds were authorized to fund the project is not clear on the record. However, as early as May 1984, the Director of the Training Division of the Employment Security Department (ESD) (now, the New **Mexico** Department of Labor) raised potential problems with JTPA funding of the Degem project with the Secretary of ESD. **See** G.O. Ex., pp. 210-211. Furthermore, early in 1984 the Secretary of ESD unofficially requested the opinion of ESD Legal Counsel concerning the legality of using JTPA funds to acquire **CAI** systems. Statement of Richard Baumgartner (Baumgartner Stmt.), G.O. Ex., pp. 216-220. Counsel advised the Secretary of ESD that such an acquisition would be illegal under JTPA and relevant

state procurement laws. Id. The Secretary of ESD purportedly agreed. Id. Sometime later, counsel inquired about the Degem project's status, and was informed that agreement between Degem and UNM had been reached for a joint demonstration development program in the State. Id. Counsel approved the final **Subgrant** dated September 13, 1984, between ESD and UNM ("Agreement for Purchase of Equipment for **CAI** Programs"). He stated that he did not realize that the agreement involved Degem or the acquisition of **CAI** systems. Id. Counsel believed that he signed off on the document without actually inspecting it and stated that if he had analyzed and understood it, he would not have approved it. Id.

As to formulation of the terms of the subgrant, by June 1984, Degem and UNM had prepared a cooperative, preliminary agreement and signed a letter of intent with the Governor. ESD Ex., Tab. 4. The letter of intent restated **Degem's** intent to base its **CAI** efforts in the State, initially in marketing, and later in a manufacturing plant to serve as the sole production facility in the United States for all lines of Degem activity, including expansion to Asia and Latin America as well. Id. Degem anticipated sales of \$500 million within 5-6 years. Id.

In the final Degem-UNM agreement, dated September 7, 1984, ESD Ex., Tab 12, UNM agreed to establish a Center for Applied Technologies in Learning (CATL) to accomplish evaluation of the project, demonstration and research and development. CATL was to be funded on a 50-50 basis between UNM and Degem, in the amount of \$125,000 each per year. UNM agreed to lease from Degem 5

stationary systems and 1 mobile unit, for \$420,000 per year. UNM would acquire title to the systems if it made all lease payments over three years. ^{3/} Id. at Exhibit F; Letter of September 7, 1984, from Degem to UNM, re Irrevocable Option and Undertakings Regarding **Degem-UNM's** Agreement, ESD Ex., Tab. 12.

2. The UNM Subgrant

The Degem-UNM agreement was incorporated into the initial **Subgrant** from the State Employment Security Department to UNM. ESD Ex., Tab 1, ¶ 18. The Subgrant, dated September 13, 1984, granted to UNM regular Title II-A JTPA funds of \$300,000 for the first year of an intended three-year program in order to purchase equipment. The **Subgrant** agreement, entitled "Agreement for Purchase of Equipment for **CAI Programs**," provided that UNM, through CATL, would locate 3 stationary **CAI** systems and 1 mobile unit at various sites in the State and facilitate the demonstration of these systems, provide for teacher training and evaluate the program. The **Subgrant** did not identify the content of training to be provided, did not mention training of JTPA II-A eligibles and did not provide goals or evaluation criteria for training of any kind. The **Subgrant** charged the entire **\$300,000** to the training category, specifying in the Budget Information

^{3/} It appears that a total of 3 stationary **systems** at an annual lease cost of \$60,000 apiece (total **\$180,000**), and 1 mobile unit at \$120,000, were ultimately installed. Hearing Transcript (H.T.) at 49-50. Thus, the total lease cost was \$300,000 per year for a **3-year** period. Degem-UNM Agreement, Exhibit F, ESD Ex., Tab. 12. This is the amount that was funded per year with JTPA II-A funds.

Summary Backup that this amount represented the cost of nonexpendable equipment, specifically, the lease/purchase of 3 stationary **CAI** systems and 1 mobile unit. The **CAI** equipment was purchased sole-source through Degem and no competitive bidding or cost comparisons were performed. ^{4/} See ESD Ex., Tabs 5, 6; Testimony of Dr. Blackwell, **H.T.** at 96, 107; Monitor's Report of **March** 6, 1985, ESD Ex., Tab 29; State Auditor's Workpapers (SAW), **p.** 245.

Problems with the initial **Subgrant** quickly surfaced. In September 1984, an ESD Bureau Chief notified the ESD Training Division Director of the **subgrant's** non-compliance with United States Office of Management and Budget (OMB) Circular A-102 in sole-sourcing the purchase of computer equipment. SAW, p. 146. In December 1984, the Financial Auditor reported to the supervisor of the ESD Financial Management Bureau that the \$300,000 lease charge was unreasonable, and challenged the **subgrant** for its failure to identify the number of JTPA participants to be served and to target groups in the JTPA state plan as slated for training. SAW, p. 151.

The Employment Services Division, a component of the Employment **Security** Department, is the largest and usual service provider for JTPA subgrants, **H.T.** 156, 165, 175, and its

^{4/} After the **Subgrant** was signed, a cost comparison of Digital computer equipment, the same computers that Degem provided (with some unspecified modifications), showed that unmodified equipment from Digital would have cost \$475,000, compared to \$900,000 from Degem. Mondragon Deposition at 28.

employees regularly monitor the subgrants, see Mondragon Dep. at 27, and provide training services through the Training Division for its own employees implementing JTPA programs. The Director of the Training Division testified that the problems that arose were based in the **"lack** of understanding of **a very** complex act [JTPA] by people [UNM] who do not traditionally involve themselves in running that kind of a **project.**" H.T. at 166.

Throughout the two-year life of the **subgrant** UNM failed to keep adequate records of JTPA participants served. Dr. Blackwell, the UNM official responsible for the **subgrant** as its principal investigator, H.T. at 37, did not understand until long after the program was underway what was meant by a JTPA eligible participant. H.T. at 47. Not until September 1985, a full year into the subgrant, were UNM staff responsible for recordkeeping given any formal training about the JTPA-2 forms that were required to be kept. ^{5/} JTPA Workshop, September 12, 1985, **ESD** Ex., Tab 43; H.T. at 158-161. Prior to that time virtually no records were kept. See ESD Ex., Tabs 27, 30.

A significant factor in the problem was **UNM's** misunderstanding of its own role in keeping required records. See ESD Ex., Tabs 45, 46. Procedures finalizing the

^{5/} The JTPA-1 Form is an eligibility participation form which, on the basis of the individual's financial status and other criteria, certifies eligibility under a particular title of **JTPA**, such as II-A. The JTPA-2 Form enrolls the JTPA eligible participant in a particular training program, such as a Title II-A program under a Title II-A funded subgrant. See generally Mondragon Deposition at 8-15.

recordkeeping requirements were not put in place until well into the second year of the program. See Memorandum of December 19, 1985, ESD Ex., Tab 57. As of February 1986, when the state auditors examined the project, information as to enrollees still was not being properly recorded, G.O. Ex., pp. **294-295**; Testimony of Dr. Blackwell, H.T. at 55-56, and only 39 **JTPA** applications had been received. State Auditor's Report of March 27, 1986, p. 4, ESD Ex., Tab 60.

The Secretary of ESD conceded on several occasions that the **count** of JTPA eligibles served was not properly maintained and would have to be reconstructed, ESD Ex., Tabs 64, 77, 81, because the required JTPA forms on participants served were never completed. The number of JTPA II-A eligibles served in the two years of the **subgrant** was reconstructed after the **subgrant** was terminated by identifying JTPA II-A eligibles from records of their eligibility in other subgrants. H.T. at 180-181. By this method it was determined after-the-fact that a total of 382 JTPA II-A eligibles were served on at least one occasion over a **two-** year period -- 144 in the first year and 238 in the second year. State of New Mexico's Response to JTPA Grant Officer's Initial Determination (State's Response), June 3, 1987. G.O. Ex., pp. 37-51. ^{6/} By contrast, in the beginning of the second year of the subgrant, on October 4, 1985, the total of all students then being served was 1,775. SAW, p. 176.

^{6/} Virtually the same numbers appear in the earlier Governor's Audit Resolution Report of March 31, 1987. G.O. Ex., pp. 69-88.

Once the **CAI** systems were installed at various educational sites, training in arithmetic, English and typing was made available to UNM students at the respective sites and often to the general public. Each system consisted of a central computer unit for the instructor's use and 30 satellite computer terminals for direct use of the participants. H.T. at **38-40**; 113. The courseware was able to assess initial skill or achievement level of participants, provide drill and practice programs tailored to the participant's **level**, and provide continuous feedback to the participants on their achievement. H.T. at 110-152. Although the computers were capable of printing records of participant achievement on an ongoing basis, the records were not regularly printed or preserved. H.T. at 136-137. Later studies were presented to show that the progress of the students was enhanced significantly by the use of the systems. Affidavit of Jack Gittinger with Exhibits.

The Monitor's Report of March 6, 1985, raised serious concerns about the subgrant. ESD Ex., Tab 29. The monitor found that the sole-sourcing of the Digital-manufactured computer systems from Degem conflicted with **UNM's** internal Purchasing Policies which required competitive bidding and special approval. **Id.** at pp. 2-3. Further, the monitor found that competitive bidding was required under the state Public Purchases Act at **13-1-1** through 13-1-27, and under federal law. **See** OMB Circulars **A-87** and **A-102** as incorporated into the State JTPA Financial Management Information System Guide. **Id.** at p.5. The monitor

also found that the lease/purchase charges were unreasonable, and that training monies earmarked for JTPA II-A eligible participants were being impermissibly used for research and development purposes and to purchase computer equipment. Id. He concluded that the **Subgrant** could be an abuse of JTPA and its regulations and recommended that his findings be referred to the ESD Legal Department for appropriate compliance action. Id. at p.6.

3. The Modification

After issuance of the March 1985 Monitor's Report, ESD Legal Counsel reviewed the initial Subgrant, G.O. Ex., pp. 216, 218, and determined it to be a "legal nullity." State's Response, G.O. Ex., pp. 35, 41. Because he found the **Subgrant** void whether considered as a purchase of equipment or as a program for delivery of training services, he prepared a modification document which allegedly more correctly contained the original intent of the parties. G.O. Ex., pp. 216, 218. The resulting **Subgrant** Modification was signed August 9, 1985. ESD Ex., Tab 2.

The Modification extended the second year of the contract, providing additional funding of \$300,000, and purported to redefine the initial **Subgrant's** provisions. The agreement's title was changed to "Computer Assisted Instruction Service Agreement" and provided that UNM would provide **CAI** services to 200 JTPA eligible participants in the first year (retroactively) and 300-500 such participants in the second year. The Addendum to 1985-86 Scope of Work provided for **CAI** training courses in

math, English, typing and other courseware for students, and provided that JTPA eligible persons were guaranteed access to the system. **Id.** The Budget Information Summary Backup was changed to provide \$300,000 for training costs for the "Purchase of Computer Assisted Instruction **Services.**" **Id.** Incorporation of **the** Degem-UNM agreement was deleted. **Id.** The Modification thereafter allegedly was submitted to the Employment Services Division and UNM to establish an appended training plan to be implemented and monitored in accordance with JTPA and applicable recordkeeping requirements. This "critical part of the contract performance" was never done. Baumgartner Stmt., G.O. Ex., p. 216, 218.

Although under the Modification JTPA eligible participants were to be given priority on the systems, the actual events show otherwise. No differentiation was made among student users of the **CAI** systems. H.T. at 71-72 and 96-97; at 149; and at **182-183**. The courseware and software were the same for all student users without differentiation as to JTPA eligibility. H.T. at 149, 182. There was no system to inform teachers which students were JTPA eligibles, H.T. at 181, and the identity of the JTPA II-A eligibles who actually used the systems was not even known until after the **subgrant** was terminated when their names were reconstructed from records kept on other grants. H.T. at 180.

4. The Audits and Investigations

In September 1985, the State auditors questioned all monies paid to UNM under the subgrant. G.O. Ex., pp. 297-301. A formal

state audit was conducted resulting in an Auditor's Report of **March** 27, 1986, ESD Ex., Tab 60, which concluded that the **Subgrant's** purpose was not to provide training for JTPA participants, but to fund a for-profit research and development venture between Degem and UNM. To the extent that training was provided, the report found that the subgrantee (**UNM**) provided insufficient documentation of services to JTPA participants. **Id.** The report recommended that ESD recover all monies paid UNM under the Subgrant. **Id.** ESD issued an Interim Monitor's Report on June 24, 1986, concluding that under the Subgrant, JTPA eligibles were not being targeted to be served and that **UNM's** organizational structure was not adequate for administering a JTPA program. ESD Ex., Tab 80. The report recommended that the third year not be refunded. **Id.**

At the request of the state auditors, the **DOL** Office of Inspector General (OIG), investigated the **Subgrant** and issued an Investigative Memorandum dated December 15, 1986. **See** G.O. Ex., pp. 89-301, 90-94. Largely because of the investigation, the Dean of **UNM's** College of ^E~~E~~ducation did not seek funding of the project for the third year. **Id.** at 94. ✓

On March 20, 1987, the DOL Grant Officer, citing the OIG investigation, issued an Initial Determination disallowing all \$600,000 in JTPA funds subgranted **to UNM**. **G.O.** Ex., pp. 26-34. The Grant Officer found the costs allocated to the program unreasonable, 20 C.F.R. § 629.37; OMB Circular A-87, and that the purpose of the **subgrant** award was not job training, but economic

development. Id. at 30-31. Additionally, the Grant Officer found that the sole-source procurement of the **CAI** systems violated both OMB Circular A-102, and **UNM's** internal policies, and he found that the Modification was an attempt to avoid proper procurement procedure by transforming a lease/purchase agreement into a JTPA Title II training subgrant. Id. at 32-33.

On March 31, 1987, the Governor, under the signature of counsel for the State in the present case, issued an Audit Resolution Report. G.O. Ex., p. 69-88. Finding, on the basis of reconstructed records, that 383 JTPA II-A eligibles were served at some time over the life of the subgrant, and that UNM performed substantial training of these JTPA participants in an amount constituting reasonable performance of the Subgrant, the report concluded that the funding was lawful and that all sums expended should be allowed. Id.

On July 14, 1987, after receiving the **State's** Response, G.O. Ex., pp. 35-68, the Grant Officer issued the Final Determination, G.O. Ex., pp. 8-25, disallowing the entire \$600,000 expenditure. The Grant Officer concluded that the training costs were unreasonable since it could not be concluded either that JTPA eligibles were adequately served or that the number trained reasonably approached the goals set in the Modification to receive training. Id. at 17. The Grant Officer also concluded that the procurement was improper because competitive bidding was required, OMB Circular A-102, and because the sole-sourcing

provisions of 29 C.F.R. § 629.38(e)(2) and 29 U.S.C. § 1551(d)(3) were not complied with. Id. at 20-21.

5. The ALJ Decision

Following a State-requested hearing under JTPA Section **166(a)**, concerning the sanctions (disallowance) imposed by the Grant Officer, the ALJ disallowed the entire \$600,000 expenditure. The ALJ found that costs were misapplied under 20 C.F.R. § 629.37(a) because they were not properly allocable to the training program, but constituted instead a general expense required to carry out the overall responsibilities of the Governor or the subrecipient (UNM). The ALJ found that 20 C.F.R. § 629.38(e)(2) ^{1/} was violated in that the **Subgrant** made no provision tying payment of costs to whether participants completed or were placed into jobs. The **ALJ** found that no competitive bidding occurred, citing the provisions of OMB Circular A-102, a sound practice calculated to assure proper value received for funds expended. Finally, the ALJ concluded that because the State did not substantially comply with 29 U.S.C. § 1574(e)(2), it could not thereby escape liability for noncompliance by its subgrantee. The State excepted to the **ALJ's** decision and I granted review. 29 U.S.C. § 1576(b).

^{1/} Although the ALJ states that 629.38(b) clause (iii) was violated, D. and O. at 10, ¶ 2, it is clear that he is referring to section 629.38(e)(2).

DISCUSSIONTraining

A valid JTPA training program, funded with JTPA II-A funds, **must** necessarily be established for the purpose of training JTPA **II-A** eligible participants. See 29 U.S.C. § 1603. In the present case the entire cost of the JTPA **subgrant** was charged to and, following the Modification, purportedly expended for training. The applicable regulations provide that, "[t]o be allowable, a cost must be necessary and reasonable for proper and efficient administration of the program ... and not be a general expense required to carry out the overall responsibilities of the Governor or subrecipient." 20 C.F.R. § 629.37(a) (emphasis supplied). Further, "costs resulting from violations of, or failure to comply with, Federal, State or local laws and regulations are not allowable." 20 C.F.R. § 629.37(c)(1) (emphasis supplied). Moreover, language virtually identical to regulatory section 629.37(a) is contained in OMB Circular A-87, Attachment A, ¶ C.1.a., G.O. Ex., p. 319, which, in turn, was adopted by the State of New Mexico on November 28, 1983. JTPA Financial Management Information System Guide, G.O. Ex., pp. 98, 103.

I conclude, based on my evaluation of facts in this case, that JTPA II-A funds should not have been charged for this **subgrant** because the costs were not "necessary and reasonable" for the administration of a JTPA training program, but instead, constituted a general expense required to carry out the overall

responsibilities of the State and the subrecipient, the University of New Mexico. 20 C.F.R. § 629.37(a). From the beginning, the manifest purpose of the initial **Subgrant** was the lease/purchase of 4 **CAI** systems for UNM, which was an integral part of a demonstration project for the research and development of advanced learning technologies in the State of New Mexico. The State's interest was motivated significantly by the anticipated manufacturing plant which Degem proposed to establish and which would greatly enhance the economic development of the State. **UNM**, on the other hand, sought to acquire the systems, and, equally important, to establish the ongoing facility (**CATL**) **for** the research and development of advanced learning technologies. While these may be laudable purposes, they are not purposes for which JTPA funds may be expended.

The training services contemplated in the initial **Subgrant** were only an indirect consequence of the economic development objective. JTPA eligible individuals were never mentioned as targets of any training, much less were JTPA II-A eligibles considered. The complete absence of any training plan in the **Subgrant** further underscores the fundamental purpose of the **Subgrant** to set up a **CAI** demonstration project as the first step of a wider economic development plan in the State, in which **UNM** would acquire **CAI** systems and control the research and development function.

As to actual performance of the Subgrant, UNM did not know what a JTPA II-A eligible participant was until the second year

of the **subgrant** and the teachers who ran the **CAI** program likewise were uninformed. JTPA II-A participants were only ultimately identified by their enrollment in other grants after the two-year **Subgrant** terminated. ^{8/} Because JTPA eligibles were never contemporaneously identified, there is no proof that they were given any priority on the systems. Rather, all students, and even the general public, were given access without differentiation. Students who paid their own tuition received the same access as students whose UNM tuition was otherwise **JTPA-**funded, but the training program charged JTPA II-A funds additionally for these same services.

The second-year post hoc Modification did little, if anything, to alter the purpose of the **subgrant** or the actual performance of UNM under it. Recordkeeping remained wholly

^{8/} The subrecipient's failure to keep adequate records directly violates 20 C.F.R. § 629.35(c), which requires that

the Governor shall ensure that records shall be maintained of each participant's enrollment in a JTPA program in sufficient detail to demonstrate compliance with the relevant eligibility criteria attending a particular activity and 'with the restrictions on the provision and duration of services and specific activities authorized by the Act. [Emphasis added.]

The State acknowledged this failure, see pp. 9-10, supra; Reply Brief of the State of New Mexico at 9, which I conclude was not cured after-the-fact by the reconstructed records of JTPA II-A eligible participants allegedly served. The recordkeeping requirements are designed to demonstrate JTPA compliance on an ongoing basis and to assure that the programs are administered to achieve the JTPA objectives, especially targeting and effective training of individuals who need the program. The attempt to legitimize substantive program defects after-the-fact by belatedly creating required records defeats these purposes.

inadequate to the end, thereby preventing the subrecipient from targeting the very persons it was required to train. The fact that some JTPA II-A eligibles were found to have had access to some of the purchased equipment, cannot legitimize a program for purposes of JTPA funding that failed to target JTPA eligible participants for training and that was designed fundamentally for economic development purposes unrelated to the Job Training Partnership Act.

Procurement

The JTPA regulations governing procurement require that "recipients and subrecipients shall administer procurement systems that reflect applicable State and local law, rules and regulations as determined by the Governor." 20 C.F.R. § 629.34. Further, "[c]osts resulting from violation of, or failure to comply with Federal, State, or local laws and regulations are not allowable." 20 C.F.R. § 629.37(c)(1) (emphasis added). The (New Mexico] Public Purchases Act (PPA), Chapter 13, NMSA 1978 (1983 Repl. Pamph.), ^{2/} in general, requires that procurements in excess of \$5,000 and not otherwise exempted from the PPA be achieved by competitive bidding. See PPA, Section 13-1-11.

OMB Circular A-102, governing procurement standards, and made applicable to New Mexico JTPA procurement procedures in the

^{2/} The Public Purchases Act was significantly amended and **recodified** by the State Procurement Code, effective for contracts entered into on or after November 1, 1984. As the initial **Subgrant** and the Degem-UNM agreement were signed prior to that date, the PPA is applicable and all PPA references are to the 1983 Replacement Pamphlet.

JTPA Financial Management Information System Guide, G.O. Ex., p. 98, 102, permits noncompetitive negotiation in only a limited number of circumstances, one of which is the availability of the item only from a single source (the other circumstances being irrelevant to this case). Because OMB Circular A-102 was officially adopted by the State, it reflects applicable State and local law, rules and regulations as determined by the Governor, for purposes of 20 C.F.R. § 629.34.

If the above-cited procurement laws apply -- a conclusion which the State resists -- they were clearly not complied with. Competitive bidding did not take place nor did the State or UNM demonstrate that the **CAI** systems manufactured by Digital were available from only a single source, Degem. Whatever modification Degem made to these computers was not made clear, but no investigation of whether other competitors could provide the same equipment was performed. ^{10/}

The record evidence shows that the Subgrant, even as modified, contemplated in significant part the lease/purchase of the **CAI** systems from Degem. The deletion in the Modification of ¶ 18 of the initial **Subgrant** (which had adopted the Degem-UNM agreement) did not alter or repudiate the terms of the Degem-UNM agreement that if all lease payments were made over three years,

^{10/} The State's argument that the **CAI** systems were "unique," without more, falls far short of the showing needed to establish that they were available only from a single source. No attempt was made to show that other sources could not provide exactly the same equipment.

UNM would acquire title to the systems. While the Modification specifically referred to training services, the objective of procuring the **CAI** systems by UNM remained.

The State argues that the purchase of materials, services or real property is exempt under the New Mexico Public Purchases Act where the procurement is **"by a state agency or a local public body from a state agency or local public body"** (UNM). New Mexico Brief-in-Chief at 25, citing PPA Section **13-1-24A**. I disagree that this exemption is applicable here. In the first place, the purchase is, in significant part, one for **"materials"** (CAI systems) between UNM and Degem, and not for the purchase of such property by the State from UNM. UNM, as a local public body, is no-where excluded from the requirements of the PPA. Further, the Public Purchases Act should not be interpreted to permit the interposition of UNM as a **"local public body"** to defeat the applicability of State procurement procedures where **"materials"** are being procured from a third party vendor. I conclude that the procurement of the **CAI** systems by UNM from Degem was subject to the provisions of the Public Purchases Act.

Further, the State has offered no reason for noncompliance with OMB Circular A-102, which also mandates competitive bidding. As stated in the JTPA Financial Management Information System Guide, G.O. Ex., pp. 98, 102, OMB Circular A-102 applies in the case of all JTPA programs in New Mexico, except where specifically excepted by the Governor. No such exception was made on the record of this case. Additionally, it is clear from

Attachment 0, ¶ 1 (Applicability) of the Circular that it applies to the procurement of equipment. G.O. **Ex.**, p. 320.

I find unpersuasive the State's arguments that payments to UNM under the **subgrant** were for training services UNM rendered to the State and that UNM's procurement methods are irrelevant. As stated above, the Public Purchases Act and OMB Circular A-102 applied to the procurement by UNM of **CAI** systems from Degem as contemplated by the **Subgrant** and its Modification. To the extent that training services also were purchased by the state from UNM under the subgrant, JTPA was violated. 29 U.S.C. § 1551(d)(3). The statute provides that "commercially available training packages, including advanced learning technology, may be purchased for off-the-shelf prices and without requiring a breakdown of the cost components of the package if such packages are purchased competitively and include performance criteria."

(Emphasis supplied). See also 20 C.F.R. § 629.38(e). Neither of these required conditions was met.

Sanctions

JTPA provides that "[e]very recipient shall repay to the United States amounts found not to have been expended in accordance with this chapter." 29 U.S.C. § 1574(d). See s o 20 C.F.R. § 629.44(a). I am required "to hold the Governor responsible for all funds under the grant," 20 C.F.R. § 629.44(d)(1), and to "determine the liability of the Governor for misexpenditures of grant funds in accordance with section 164(e) of the Act, including the requirement that the Governor

shall have taken prompt and appropriate corrective actions for misexpenditures by a **subrecipient**." 20 C.F.R. § 629.44(d)(2).

Section 164(e)(2) provides:

In determining whether to impose any sanction authorized by this section against a recipient for violations by a subgrantee of such recipient under this chapter or the regulations under this chapter, the Secretary shall first determine whether such recipient has adequately demonstrated that it has-

(A) established and adhered to an appropriate system for the award and monitoring of contracts with subgrantees which contains acceptable standards for ensuring accountability;

(B) entered into a written contract with such subgrantee which established clear goals and obligations in unambiguous terms:

(C) acted with due diligence to monitor the implementation of the subgrantee contract, including the carrying out of the appropriate monitoring activities (including audits) at reasonable intervals: and

(D) taken prompt and appropriate corrective action upon becoming aware of any evidence of a violation of this chapter or the regulations under this chapter by such subgrantee.

29 U.S.C. § 1574(e)(2). I find that the State has not demonstrated adherence to subsections (A), (B) and (D). The award of the **subgrant** to UNM which derivatively approved the **Degem-UNM** agreement, inappropriately disregarded required procurement procedures. The State entered into a **Subgrant** with **UNM** which had virtually no training goals or obligations and authorized a Modification which, in practice, effected little change in **UNM's** administration under the **subgrant** in providing training to JTPA II-A eligible participants. Although the

State's monitoring uncovered critical flaws in sole-sourcing, purchase costs and the absence of training for JTPA II-A eligibles, the corrective action the State took was neither prompt nor effective. Despite the State's having uncovered **UNM's** failures in recordkeeping and in targeting JTPA participants for training, the State did not effectively coordinate a solution between ESD and UNM to correct either failure. For these reasons, I conclude that the State has not demonstrated substantial compliance with the requirements of Section **164(e)(2)(A)**, (B) and (D) and that the \$600,000 expenditure shall be disallowed. 29 U.S.C. § 1574(e)(1) and (3).

Apportionment

The State urges remand of this case for an additional hearing for apportionment of the \$600,000 in issue, rather than total disallowance. As ground for remand, the State argues that approximately \$1.1 million in cash and "**in-kind**" contributions of non-JTPA funding were used to carry out the total endeavor involving UNM and Degem, and that, even though non-JTPA eligible participants used the **CAI** systems, the sharing of use should not be objectionable. ^{11/} On remand the State would seek to show the

^{11/} I find the State's contention that **\$1,109,000** of non-JTPA funds and contributions were used "**to** carry out the total endeavor" unavailing. State of New Mexico Brief-in-Chief at 20. In the first place, **UNM's** contribution of \$360,000 for two **CAI** systems it purchased from Degem after termination of the **subgrant** cannot be attributed to costs of this subgrant. Further, the contributions of Degem and UNM in the amount of \$425,000 to CATL are questionable since **CATL's** function was primarily research and development, and the amount of the CATL funding actually earmarked and paid for the JTPA **subgrant** is not specified. The
(continued...)

ratio of non-JTPA users to JTPA II-A users, and, using the ratio of non-JTPA funds to JTPA II-A funds, thereby present a basis for apportionment.

I do not find this case appropriate for apportionment. The failure of the State and UNM to follow JTPA training standards both in the terms of the **subgrant** and in the performance thereunder, and their joint failure to follow acceptable procurement practices are themselves sufficient and necessary grounds for disallowance without apportionment.

Further, the State has not been denied the opportunity to present evidence on the issue of apportionment. At all times below the State elected to limit its argument to contending that it complied with applicable law and that all of the \$600,000 should be allowed. Memorandum Brief of the State of New Mexico, filed September 15, 1989. Had the State desired apportionment, it could have argued the issue in the alternative, and presented appropriate evidence, both before the Grant Officer and before the **ALJ**. The record reflects that all information the State offered was received. H.T. at 4-6, 191. The ALJ's gratuitous

11/ (. . .continued)

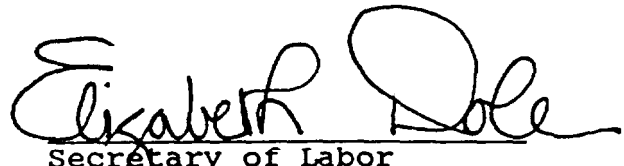
"in-kind" contributions in the amount of \$364,000 of Degem are overstated and inherently questionable. In this regard, the State argues that Degem contributed \$44,000 apiece for 6 stationary sites, but the **Subgrant** and record evidence show that **only 3** stationary systems were used. Initial **Subgrant** of September 13, 1984, ESD Ex., Tab 1; Testimony of Dr. Blackwell, H.T. at 49-50. Further, the fact that **Degem's** contribution was "in-kind," for purposes of transporting and helping set up the systems, rather than in cash, gives rise to the inference that the contributions are merely illusory, and that **Degem's** services are actually derived from the price of the subgrant.

mention of apportionment for the first time in his Decision and Order should not and cannot serve as a basis to retry **a** case which, **I** find, presents substantial, independent grounds for total disallowance.

ORDER

Accordingly, I affirm the **ALJ's** decision that the State misexpended \$600,000 of JTPA II-A funds under the **subgrant** to the University of New Mexico, and that this expenditure must be disallowed in its entirety. The State of New Mexico is hereby ordered to reimburse the Employment and Training Administration \$600,000 from non-Federal funds.

SO ORDERED.


Secretary of Labor

Washington, D.C.


CERTIFICATE OF SERVICE

Case Name: In the Matter of State of New Mexico v. United
States Department of Labor Grant Officer

Case No. : 87-JTP-27

Document : Final Decision and Order

A copy of the above-referenced document was sent to the following
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